

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MARYLAND  
NORTHERN DIVISION

COLUMBIA GAS TRANSMISSION, LLC, )  
 )  
 vs. ) CRIMINAL CASE NO.  
 ) 1:19-cv-01444-GLR  
 12 ACRES OF LAND, More or Less, )  
 in Washington County, Maryland, )  
 State of Maryland, Department of )  
 Natural Resources, )  
 Defendant. )

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Wednesday, August 13, 2019  
Courtroom 7A  
Baltimore, Maryland

MOTION FOR PRELIMINARY INJUNCTION

BEFORE: THE HONORABLE GEORGE LEVI RUSSELL, III, Judge

For the Plaintiff:

David Fedder, Esquire  
Arnold Weiner, Esquire  
Michael Harriss, Esquire

Attorneys for Columbia Gas Transmission, LLC

For the Defendant:

Adam Snyder, Esquire  
John Howard, Jr., Esquire

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Reported by:

Nadine M. Gazic, RMR, CRR  
Federal Official Court Reporter  
101 W. Lombard Street, 4th Floor  
Baltimore, Maryland 21201  
410-962-4753

**P R O C E E D I N G S**

**THE CLERK:** The matter now pending before this Court is Civil Docket Number GLR-19-1444, Columbia Gas Transmission, LLC versus 12 Acres of Land More or Less in Washington County Maryland, State of Maryland, Department of Natural Resources. Counsel for the plaintiff --

**THE COURT** .12 Acres of Land.

**THE CLERK:** Counsel for the plaintiff, David Fedder, Michael Harriss and Arnold Weiner. Counsel for the defendant, Adam Snyder and John Howard, Jr. This matter now comes before the Court for the purpose of a preliminary injunction.

**THE COURT:** All right, once again, good morning, Counsel and welcome. As indicated by the courtroom deputy, we're here for the purposes of a hearing on whether or not Columbia Gas should be afforded preliminary injunctive relief to be allowed to begin to construct a pipeline, an eight-inch natural gas pipeline under state-owned property which is a rails and trails roadway or area totaling .12 acres. The project itself, the property in question is adjacent directly to the Potomac River in this matter.

I have had the opportunity to review the well-written briefs in this matter and so I will start, I guess, with Columbia Gas in this case to argue for me why it is that they believe they've got a likelihood of success on the merits given the Supreme Court's extreme skepticism

1 regarding the delegation of authority, their vested authority,  
2 as well as the Eleventh Amendment immunity provisions.

3 So Mr. Fedder, I will let you sort of take the lead.  
4 I have a tendency especially when we're talking about sort of  
5 emergency injunctive preliminary relief, since I have had the  
6 opportunity to review the briefs in the case and we had a  
7 brief teleconference regarding scheduling, I believe I'm  
8 pretty conversant on the facts, but I may end up interjecting,  
9 interrupting you to hone in on some of the facts that I think  
10 that may be persuasive and/or determinative in the matter. So  
11 I'll be more than happy to hear from you, sir.

12 **MR. FEDDER:** Thank you, Your Honor.

13 **THE COURT:** By the way, since -- and go ahead and  
14 get set up -- but since the briefing in this case, has the  
15 Federal Government acquired the other two -- other three  
16 tracts of park property in this case?

17 **MR. FEDDER:** No, Your Honor. That process is  
18 ongoing. There have been further substantive -- there's more  
19 progress that has been made and some further requests came  
20 from the Federal Government. And what they had asked for as  
21 of last Monday or -- well, Monday, it was yesterday. Those  
22 requests have been met and it's progressing along.

23 **THE COURT:** Okay, so with that in mind, the project  
24 can't move forward until those tracts are acquired. So how is  
25 it -- isn't that sort of a pre-condition to the irreparable

1 harm argument that you're making?

2 **MR. FEDDER:** The project itself cannot be  
3 constructed, that's true, Your Honor. But we do cite to case  
4 law in our memorandum in support and in our reply brief that  
5 states for the proposition you can't wait for the point of  
6 beginning until we have everything, you have to pursue  
7 everything in parallel paths. And that was recognized  
8 recently in the Southern District of West Virginia. I think  
9 it was by Judge Copenhaver in the Mountain Valley Pipeline  
10 case and it's been recognized in other districts as well  
11 because by the nature of these types of cases, there are so  
12 many permits, so many approvals that are necessary, that if we  
13 had to wait until everything was in hand before we could seek  
14 the last piece, there would never be a last piece and all  
15 timelines would be -- would be unachievable.

16 **THE COURT:** Now let me ask you one other question --  
17 well, one of several other questions. Has your client -- and  
18 I understand if you decline to respond to this -- but it seems  
19 to me in light of the Chao case, that this exercise and the  
20 uphill battle which you may end up having to climb related to  
21 private parties suing states and the immunity provisions are  
22 eliminated if I believe the Secretary of the Interior or the  
23 Federal Government intervenes like they did in Chao, right? I  
24 mean, and in fact, a review of the State's briefs seem to if  
25 not -- I'm not going to put words in their mouth -- but it

1 seems to almost, almost do everything but concede it that if  
2 the Federal Government comes in and takes political  
3 responsibility for this project, then we're not here.

4 **MR. FEDDER:** If it were only so, Your Honor, that  
5 would be wonderful. And you cannot necessarily just take my  
6 word for it, but you can look back through the FERC dockets  
7 and through the 70-plus years of practice in Natural Gas Act.

8 The Federal Government does not condemn for natural  
9 gas pipelines. The Natural Gas Act gives condemnation  
10 authority to private pipeline companies upon certification by  
11 the Federal Government through the very complicated and  
12 prolonged FERC regulatory process which gives them the Federal  
13 Government's delegated right, sovereign right of eminent  
14 domain.

15 **THE COURT:** They've never done that before in a  
16 natural gas pipeline.

17 **MR. FEDDER:** The Federal Government, to my  
18 knowledge, Your Honor, has never been -- we've looked.

19 **THE COURT:** And the State of Maryland has never  
20 asserted the immunity provisions ever before.

21 **MR. FEDDER:** That's true. And if I can, I was going  
22 to get back to Chao in the kind of back end of our discussion.

23 **THE COURT:** Sure.

24 **MR. FEDDER:** Because we really have the starting  
25 point where we were going to kick off here with Your Honor's

1 question was why is the State wrong and why are we irreparably  
2 harmed in face of their sovereign immunity argument. And what  
3 it comes down to is why are they arguing sovereign immunity?  
4 And their sovereign immunity argument comes because of a  
5 recent, a very recent 2017 case from Texas, the Sabine  
6 decision that was handed down by a District Court in Texas,  
7 under Fifth Circuit Law, misapplying Blatchford after  
8 correctly looking to U.S. Supreme Court law. So some of this  
9 is going to be new and I know the Court is well studied under  
10 the briefing that's been submitted, but the posture is a  
11 little bit confused by virtue of the way this came before the  
12 Court.

13 So we moved for our preliminary injunction, the  
14 State moved to dismiss. We filed our reply. The State's last  
15 word was their reply to our motion. They had the last word.  
16 Their last word went into substantially more depth about the  
17 basis for their motion. And in that motion they did two  
18 things that caused us to do a much deeper dive to be able to  
19 better come today to explain to the Court why we believe their  
20 position is completely unfounded. They took the U.S. Supreme  
21 Court case of Carmack and they take pieces of it out of  
22 context and mischaracterize it and cite that as one of the  
23 bases for why they are right, they say. And the other thing  
24 they do is they basically cut and paste from the Sabine  
25 decision in the Fifth Circuit and say, Sabine said pipeline

1 company loses in this situation, so a pipeline company loses  
2 in this situation.

3 So that caused us necessarily to go back and really  
4 look at Carmack. And when you look at Carmack it takes you to  
5 the U.S. versus Kohl case from the late 1800s which first  
6 recognized and really explained where the federal power and  
7 the federal right of eminent domain comes from. It's not from  
8 the Constitution, it's not from the consent of the states.  
9 Kohl explains it is an inherent right in the sovereign that is  
10 not from the Constitution. It wasn't given to the Federal  
11 Government and it's not dependent upon the consent from the  
12 states.

13 So with that lead in, Judge, just to kind of outline  
14 where our argument is going to go, we think that the State's  
15 position is wrong for 3 reasons, three primary reasons:

16 First, Sabine, the case they primarily rely on, the  
17 only case to find that a natural gas company cannot condemn a  
18 state-owned property under the Natural Gas Act, is wrong  
19 because it misapplies the U.S. Constitutional Law --

20 **THE COURT:** Well, a private entity. Let's look at  
21 it from a private citizenry standpoint. I know it doesn't  
22 express that.

23 **MR. FEDDER:** Yes, Your Honor. That's the language  
24 from the Eleventh Amendment, private citizen. And we're  
25 different than what was intended to be covered by that by

1 virtue of what I'm going to talk about and where the other --  
2 had it been properly analyzed under Kohl and U.S. Boom  
3 Mississippi and Carmack, had it gone down the right path of  
4 analysis where it would have gone under a superior sovereign  
5 and Federal Government versus State Government analysis, where  
6 that conclusion would have led, we're right because of that  
7 proper analysis.

8 We're also right because the second place where the  
9 Sabine decision went off the rails is it was dependent upon  
10 after the Court misapplied Kohl and then played it forward, it  
11 then said because of what we've now said which is the only  
12 reason that the pipeline company could have delegated  
13 authority or could have authority to condemn in light of the  
14 sovereign immunity granted by the Eleventh Amendment is if it  
15 was delegated.

16 So then Sabine said we, that's in the Fifth Circuit,  
17 have held under the Texas Tech case which is cited in the  
18 State's opening brief, we've held that you can't delegate  
19 authority to non-designated private citizens -- and there's  
20 some additional verbiage -- and they cite to that Fifth  
21 Circuit case. The interesting thing there, that was a qui tam  
22 case under the False Claims Act. When you look at that case,  
23 the Fifth Circuit in the Texas Tech case was reversing a Texas  
24 District Court that had ruled in favor of the qui tam  
25 plaintiff who was suing in a representative capacity on behalf



1 of the Federal Government. And the State had raised the  
2 Eleventh Amendment and the District Court said not a bar, they  
3 can bring this suit on behalf of the United States. The  
4 District Court ruled against that Eleventh Amendment challenge  
5 based upon Fourth Circuit law from the Milam case.

6 Now the State doesn't cite to Milam anywhere in its  
7 brief, but the State invites this Court to rely on the Fifth  
8 Circuit law expressly in its opening brief and then doubles  
9 down in its reply brief relying entirely on Sabine, which is  
10 relying completely on Fifth Circuit law to go down its path  
11 with its analysis. So that's the second place where Sabine  
12 completely goes off the rails as it relates to Fourth Circuit  
13 because as the Court is aware, in the Fourth Circuit, from  
14 Milam and as has been affirmed since, qui tam cases under the  
15 False Claims Act are absolutely permitted. They're not barred  
16 by the Eleventh Amendment because of sovereign state immunity.  
17 And I'm getting ahead a little bit here, but playing forward  
18 the concept, the State argues that once you get past state  
19 consent that wasn't given and once you get past like the Fifth  
20 Circuit, Sabine says it can't be delegated ever. It's not  
21 proper to get past that because that's relying on --

22 **THE COURT:** Well, didn't the Supreme Court say that  
23 the delegation argument was a strange phenomenon in that --

24 **MR. FEDDER:** They did.

25 **THE COURT:** -- and that it raised great skepticism

1 regarding the ability of the Federal Government to delegate to  
2 private citizens the authority and weight vested in it even  
3 under the Fourteenth Amendment clause?

4 **MR. FEDDER:** Absolutely, Your Honor. And in the  
5 context of which it's been presented to the Supreme Court, I  
6 can understand why skepticism was expressed. But when you  
7 look at those opinions -- and I've been looking at them very  
8 closely over the past several weeks -- I think I'm correct  
9 when I say all of them are 5/4 decisions and I think every one  
10 of those decisions there are dissents that are written that  
11 are much more lengthy and extremely well-reasoned as compared  
12 to the primary opinion. Justice Brennan and Justice Blackmun  
13 get into the whole --

14 **THE COURT:** The majority might take some exception  
15 to that classification.

16 **MR. FEDDER:** I understand, I understand. I'm just  
17 saying reasonable minds can differ. But what I'm saying is  
18 that's dicta from a case in which the question or the issue of  
19 the way it arose is so substantially different than what we  
20 have here. And that was the point we were trying to raise in  
21 our reply. And we didn't articulate it as clearly as I hope  
22 I'm trying to do today which is the fundamental difference  
23 between exercise of the delegated sovereign right of the  
24 Federal Government which is what we have here and what was at  
25 issue in all of those other cases that the Supreme Court has

1        been presented with the issue. There are Fair Labor Standard  
2        Acts, there are Accommodation of Handicap Education Act cases.  
3        There are instances where Congress has enacted legislation and  
4        then people argue either impliedly or expressly, Congress has  
5        tried to give people causes of action against the states. And  
6        then the Court looks at it and says, was that or was it not  
7        effective? Here the State says, we came into the union with  
8        our sovereignty, but the difference is here the Federal  
9        Government came into the union with its eminent domain power,  
10       just the same way they say we had our sovereignty. Kohl  
11       recognizes that fact. The *Mississippi Boom* case which is the  
12       case that Sage, Tennessee versus Sage which is the granddaddy  
13       of all of our pipeline preliminary injunction cases, that's  
14       what got us onto that case because I went back to kind of see  
15       where this all was coming from and why there's this huge body  
16       of authority that's uniform for preliminary injunctions and  
17       pipeline cases.

18                When you look at the language that affirms our right  
19       to seek a preliminary injunction in the Sage case, it cites  
20       back to the 1897 or 1887 case I think of U.S. v. Mississippi  
21       Boom. That's the case -- I'll give you the quote, Your  
22       Honor -- Mississippi Boom Company versus Patterson. It's 98  
23       U.S. 403 at page 806 and it was 1878. The right of eminent  
24       domain, that is the right to take private property for public  
25       uses, appertains to every independent Government. It requires

1 no constitutional recognition. It's an attribute of  
2 sovereignty. And then it goes on --

3 **THE COURT:** But hasn't the case law developed since  
4 then where you need specific and express authority by  
5 Congress? And this is an Article I statute.

6 **MR. FEDDER:** It has, but not the way that the State  
7 would have you believe that it has and not the way that  
8 they've tried to express it in their reply brief, Your Honor.  
9 It's not that the law has changed. The law that we're  
10 invoking is the law as it was when the nation was created.  
11 It's the inherent sovereign power of eminent domain. What the  
12 Natural Gas Act which creates this governing body of law  
13 regulating the entire field of transportation and sale of  
14 natural gas, including the construction of facilities for  
15 transportation of natural gas which is what we're concerned  
16 with, preempts the entire field. Congress enacted that  
17 legislation to control this because it's vital to the public  
18 interest of the United States.

19 For the first X many years it was in place, problems  
20 were encountered dealing with the states. We outline in  
21 detail in our opening brief or in our reply to their motion,  
22 that because of states as Maryland has asserted here saying  
23 hey, you're taking something from a sister state, you're  
24 delivering it to another sister state and we get no benefit,  
25 you don't have condemnation authority here. Because of that,

1 because of I think it was Indiana said, you're an interstate  
2 pipeline company. That's a matter solely for federal law. We  
3 can't recognize condemnation authority. You can't condemn  
4 here. There are a whole host of issues that outline this  
5 report that is appended as an exhibit to our reply brief, Your  
6 Honor, that can articulate very clearly what Congress was  
7 doing. The NGA -- Congress when it amended the NGA wasn't  
8 adding a new right, they simply were saying you pipeline  
9 companies upon certification by FERC that your project is ago  
10 and the route as part of the project is approved, you may go  
11 forward and exercise our federal sovereign right of  
12 condemnation to acquire the necessary right-of-way.

13 **THE COURT:** But where's the waiver, express waiver  
14 of sovereign immunity? Where is the -- where is Congress  
15 saying it's okay pursuant to Section V of the Fourteenth  
16 Amendment enforcement clause that -- you're saying you don't  
17 need that?

18 **MR. FEDDER:** That's exactly right, Your Honor.  
19 That's why we're saying it's a fundamentally different animal.  
20 And that's why it was Sabine -- the reason why there isn't a  
21 whole bunch of case law out there, it's not because as the  
22 State alludes to in their final filing that people have been  
23 getting along for 80 years and that's the evidence, the  
24 evidence of that is the fact there's only been two cases in  
25 the recent, you know, challenging this. The reason there have

1 only been two cases challenging under this principle is  
2 because this rogue outlier case of Sabine came down and now  
3 first New Jersey popped up, and now Maryland has popped up and  
4 --

5 **THE COURT:** Well, rogue outlier case, I mean, New  
6 Jersey didn't even address many of the cases that are cited in  
7 the brief. They didn't address Seminole Tribe. They didn't  
8 address Alden. They didn't address Blatchford and they didn't  
9 address Sabine. There was really no -- I mean, I appreciate  
10 my brethren in New Jersey, but that case appeared to be a  
11 little bit more complex. And this was a sort of subset  
12 category of issues that there really wasn't any substantive  
13 analysis.

14 **MR. FEDDER:** And we were -- I was initially stuck on  
15 that a bit, Your Honor.

16 **THE COURT:** I'm stuck on it too.

17 **MR. FEDDER:** And I came back though and I don't know  
18 if you'll be where I am after we talk this through today or  
19 not.

20 **THE COURT:** All right, bring me back.

21 **MR. FEDDER:** I'm in a Zen place with it now.  
22 Because at first I was like why, you know, it was the old  
23 where is the beef in the PennEast opinion when the District  
24 Court denied the sovereign immunity challenge raised by New  
25 Jersey.

1           **THE COURT:** It could be the Impossible Burger.

2           **MR. FEDDER:** Well, it could be the Impossible  
3 Burger, but I think the simple answer is it doesn't require  
4 more. What the State -- what the District Court found was as  
5 I read it now after looking through all these other cases, is  
6 that you can't separate from the delegation of eminent domain  
7 authority the exercise of the federal right of eminent domain,  
8 the sovereign's right. And I'm going to take you back to a  
9 couple other pieces of Kohl and Mississippi Boom to help  
10 expedite this a little bit. It's a right that's complete in  
11 and of itself. Because if you have to require another  
12 consent, it renders it -- and the language from Kohl that gets  
13 played forward in Carmack which is the case that the State  
14 talks about a lot, it renders the right they say nugatory. It  
15 basically said it does away with it. You can't give the  
16 states the right through a consent to take away the  
17 effectiveness of what's granted. And it's the opposite of  
18 what the eminent domain power that's supreme and we recognize  
19 in the federal court, that the federal power of eminent domain  
20 is supreme over the State. You can't take that supremacy away  
21 by giving the State a power of consent or to not consent over  
22 a power.

23           **THE COURT:** Well, you can take it away by the  
24 Federal Government coming in and intervening. I mean, as soon  
25 as the -- as soon as -- if the Federal Government comes in and

1 says we're exercising our power, it's game over. And the  
2 Federal Government then has the accountability as opposed to a  
3 private entity.

4 **MR. FEDDER:** If I might, Your Honor, so I'm going to  
5 just quickly take us back to Sage, the granddaddy case. I  
6 think Sage always answers all my questions.

7 **THE COURT:** But out of Sage you have all these  
8 grandchildren and you've got Supreme Court cases --

9 **MR. FEDDER:** I like my grandchildren.

10 **THE COURT:** --interpreting it a different way.

11 **MR. FEDDER:** But if I might.

12 **THE COURT:** Sure.

13 **MR. FEDDER:** I am looking at one of these printouts  
14 here, but it looks like it's appearing texts from Sage  
15 beginning at page 821. But it's talking about where the  
16 authority generally in the United States and federal court can  
17 come from to condemn. There's three different places.  
18 Congress sometimes exercises the power of eminent domain  
19 directly by enacting a statute that appropriates specific  
20 property, and then it cites some examples. Congress normal  
21 practice however is to delegate the power of eminent domain to  
22 certain officers who may condemn property in the name of the  
23 United States for public use. Okay? So it can delegate that  
24 power to officers. That's not what we're talking about here,  
25 and hasn't done that in the context of the NGA. So the first



1 two don't apply. Then it comes to the third one. It says,  
2 and Congress may as it did in the NGA, grant condemnation  
3 power to, quote, private corporations, close quote, executing  
4 works in which the public is interested in. That's us. So  
5 you have three paths to condemnation as recognized by the  
6 Fourth Circuit, none of which are this magical just ask the  
7 Federal Government to come in and do it for you. So it would  
8 take an act of Congress -- and you know, not to be flippant  
9 about this but we're here talking about exigency. I don't  
10 know where that fits into what we're talking about today.  
11 It's not a remedy that's available. Is it possible or  
12 conceivable that at some day in the future somebody could  
13 petition Congress and get somebody to change the law and get  
14 an act of Congress? And I don't know, Your Honor, but it's  
15 not an avenue that's available to pipeline companies.

16 And, you know, New Jersey conveniently threw that  
17 out there and it got some traction in pennies and I think it's  
18 unfortunate. It's got some intuitive appeal to it because it  
19 would be great. If we could ask FERC to jump in, but I  
20 guarantee you if we ask FERC to jump in, the first thing we  
21 get back as a challenge is show us the specific authority by  
22 statute or otherwise where the Federal Energy Regulatory  
23 Commission has authority to condemn property on behalf of  
24 itself or anybody else and the answer to that is, they don't.  
25 You know, so --

1           **THE COURT:** Well, it would be -- it wouldn't be  
2           them, it would be I guess the appropriate Secretary of the  
3           Interior who would come in and intervene.

4           But going back to your previous point, I get that  
5           the NGA allows private gas companies like Columbia to go in  
6           and condemn and take property by eminent domain and that  
7           Congress empowered them to do it. I'm with you on that. The  
8           big question I've got to decide is this abrogation issue. And  
9           there's nothing expressly in that statute which allows that,  
10          except for your argument in broad terms.

11          **MR. FEDDER:** And if I could circle back, because I'm  
12          kind of coming at my argument in pieces here, but I think  
13          actually I'm liking it more the way it's coming out now than  
14          last night in my hotel room when I was writing it down. So  
15          thank you for your help with that, Your Honor.

16          But with respect to the abrogation, the reason the  
17          Sabine Court got to abrogation and the reason -- and that's  
18          how my opposition here got there, is because first they said  
19          Kohl plus Blatchford means -- Kohl plus Blatchford means you  
20          have to look for consent. That's how they got to this issue  
21          of consent, because you have to analyze it in the context of  
22          the Eleventh Amendment, so we're saying that's wrong. And  
23          they're saying because we're looking for consent, you have to  
24          look to Blatchford. Blatchford as His Honor acknowledged,  
25          looked at two things. It mentions delegation and it mentions

1       abrogation, two separate concepts.

2               So the first one, delegation we've talked about and  
3       that was the one that they looked at with a somewhat jaundiced  
4       eye in dicta under very, very different circumstances the way  
5       it was raised there in the other cases. And the second one  
6       was abrogation, so there's two separate concepts. But in  
7       Sabine, then played forward by New Jersey, now played forward  
8       by the State of Maryland, what all of the people challenging  
9       the pipeline companies now are trying to do is saying okay, so  
10      now we talked about delegation. We're going to switch it up  
11      without really making it clear that we're switching it up.  
12      We're going to move to abrogation where there is an  
13      established case law and we're going to analyze the delegation  
14      argument under the microscope of the Supreme Court's  
15      abrogation analysis. And abrogation is a different thing.  
16      Abrogation -- and Your Honor, you can look to it. A good  
17      example, I think, would be if Congress and the NGA had said  
18      implicitly or expressly, we grant to aggrieve natural gas  
19      pipeline companies the right to bring causes of action against  
20      states for violations of the Natural Gas Act. That's more  
21      akin to what's been presented. Blatchford was jurisdictional,  
22      but the other ones where they're creating substantive rights,  
23      then you're on all fours with what's going on with the other  
24      cases the Supreme Court has looked at. That's taking away  
25      what is a constitutional defense to a statutory enactment by

1 Congress. That's what they're looking at in the abrogation  
2 cases.

3 **THE COURT:** And that would be under the Fourteenth  
4 Amendment?

5 **MR. FEDDER:** That part of Congress' -- I'm sorry,  
6 that is part of the Supreme Court's analysis which Justices  
7 Blackmun and Brennan really don't like and they also don't  
8 like that clear -- I always say it wrong.

9 **THE COURT:** But it's the law of the land.

10 **MR. FEDDER:** It's the law of the land, you're right.  
11 But they take issue with the heightened scrutiny that's given  
12 to how you determine whether it was or was not Congressional  
13 intent. They say that's the convenient thing the Court is  
14 using to try to avoid getting to what was really done. But  
15 regardless, they're analyzing a different issue coming from a  
16 different place.

17 So my point here is that the reason we're having  
18 this discussion about abrogation is because the smoke and  
19 mirrors worked and it worked on us too initially when this  
20 challenge got raised. And it worked in New Jersey when the  
21 challenge got raised. And I'm not saying we're any smarter  
22 than anybody else, I'm saying it takes a lot of staring at  
23 this stuff and drilling down to the cases and then the cases  
24 that are cited in the cases and going back to like you said,  
25 the old, old -- you know, you took issue with me going back to

1 where this came from. That's what you have to do, because  
2 that's where you identify why, what we're talking about is  
3 fundamentally different than what they're talking about.

4 But all of that being said, that's why the  
5 abrogation test and what you're struggling with, Your Honor,  
6 about how do we answer that question and where is abrogation  
7 listed, it's not. There aren't words of abrogation, but  
8 another simple answer to that, Your Honor, if the test was as  
9 the State suggests is you have to show me, the Court, where in  
10 the statute it expresses words of -- invokes State's rights,  
11 Eleventh Amendment, waiver, put it back to the State. Have  
12 them show you where in the False Claims Act --

13 **THE COURT:** You're incorporating it, just  
14 incorporating the Fourteenth Amendment clause in there.

15 **MR. FEDDER:** Fair enough, but Your Honor my response  
16 back to that is show me where in the False Claims Act there's  
17 any mention of the Eleventh Amendment, State's rights, waiver,  
18 amendment, the Fourteenth Amendment. There isn't, but the  
19 Court has recognized clearly that first it's not a bar to  
20 bringing claims, that it's being brought by somebody other  
21 than the U.S. Government. It's being brought by what they  
22 call Private Attorneys General. It's a self-appointed  
23 plaintiff trying to get paid, but it's allowed. So the test  
24 can't be that nobody other than the U.S. Government can bring  
25 a claim, because qui tam actions rely. I'm not saying we're a

1 qui tam action, I'm just saying it can't be their test.

2 And then the second part is it can't be that, the  
3 answer to if you go down an abrogation analysis, the answer  
4 has to be -- it has to be and it's identified in their brief.  
5 I'm sorry, Your Honor, I've kind of lost my place, but there's  
6 three pieces they say have to be expressed based on those  
7 Supreme Court cases. And if those pieces are not expressed on  
8 the face of the statute, you fail out of the box. If that was  
9 the test in the Fourth Circuit, you can't have qui tam actions  
10 because that's not in the False Claim Act.

11 So again, not saying we're the same as qui tam, I'm  
12 just saying the test can't be what they propose it is. But  
13 more importantly, you don't have to go there because the only  
14 reason we're having this discussion is it was a diversion and  
15 distraction from what the real discussion is. And with that  
16 said, Your Honor, so --

17 **THE COURT:** How do you distinguish Chao from this?

18 **MR. FEDDER:** I'm sorry?

19 **THE COURT:** The Chao case involved private entities.

20 **MR. FEDDER:** Right.

21 **THE COURT:** And it was dismissed twice.

22 **MR. FEDDER:** It was dismissed twice until as Your  
23 Honor pointed out, until the Secretary of Labor brought the  
24 cause of action. And that's actually -- I was trying to  
25 figure out how to use that affirmatively and for factual

1 distinction between our case and Sabine it's helpful, but  
2 talking it through right now I think that's an interesting one  
3 too because the State in that case tried to still raise  
4 Eleventh Amendment immunity saying it's not really the  
5 Secretary of Labor bringing the claim because this is the same  
6 claim that's been dismissed twice because it's really for  
7 these plaintiffs, right? And the Court said, no, no, no. It's  
8 being --

9 **THE COURT:** Wait, repeat that again.

10 **MR. FEDDER:** So the twice dismissed claims, they  
11 tried to get the Secretary of Labor to intercede before they  
12 got dismissed when the challenge came up the second time and  
13 they couldn't get the Federal Government to intercede. After  
14 it got dismissed, then the Secretary of Labor I think or  
15 somewhere in the process, but in any event when the Secretary  
16 of Labor brought the case in the name of the U.S. Government,  
17 the State raised Eleventh Amendment again.

18 So here you've got a suit that's been filed by the  
19 U.S. Government and the State said wait a minute, wait a  
20 minute. It's the same claims. And it still led to a Fourth  
21 Circuit opinion, right? So it still got all the way up the  
22 chain because the State was arguing the reverse of qui tam  
23 which is saying it's really not the State, the real party  
24 interests are the individuals and the State didn't just say  
25 no, no, no, all we look to is who the party named is. They

1 couldn't say that because that would then knock them out of  
2 the box on qui tam. What they said was we look to see who --  
3 if the U.S. Government is taking appropriate responsibility  
4 for the cause of action, and here the Secretary of Labor has  
5 authorized the suit and has filed the suit.

6 In Sabine -- and this is getting into the weeds a  
7 little bit more, this is a Fourth --

8 **THE COURT:** But the Fourth Circuit said the  
9 dismissals were correct and that the immunity defenses didn't  
10 apply.

11 **MR. FEDDER:** The immunity defenses applied when the  
12 individuals brought the claims.

13 **THE COURT:** But not when the Federal Government  
14 intervened.

15 **MR. FEDDER:** Right, but it wasn't as clean, Judge,  
16 as if the -- you would think if it's as black letter as what  
17 they say, it was only the -- based on what they're saying is  
18 the Eleventh Amendment immunity is only available to the  
19 Federal Government. And if that's really what the principle  
20 is, then Chao would have been a very simple motion to dismiss  
21 because the Federal Government brought that claim, the one  
22 that went up on appeal and was affirmed. Right? It's a very  
23 long and well-reasoned opinion explaining why you look beyond  
24 that to really see if the Federal Government is exercising  
25 control and a responsible officer is taking under the Alden



1 principle, they got into the weeds to see does this really  
2 offend the constitutional notions that are at play. And  
3 looking at that from the other side, and this is again, so we  
4 had the three primary legal arguments, this is the factual  
5 difference between us and Sabine. That case in Texas -- well,  
6 let's start with ours. EPE as is alleged in the complaint and  
7 the declaration of Jacob Haney that's been filed in support of  
8 the complaint and the supplemental affidavit, has been  
9 certificated by the Federal Energy Regulatory Commission, a  
10 two year or so process, public analysis, environmental  
11 analysis, it's all detailed in the certificate that's before  
12 the Court. It's a long process.

13 **THE COURT:** Maryland Department of Environment  
14 signed off on it.

15 **MR. FEDDER:** I was going to get to that part too,  
16 but yeah. And the Maryland Department of Environment  
17 corresponded with FERC as part of the process. So they were  
18 very much aware of the State's concerns about the state-owned  
19 property. But at the end of that process, FERC certificated  
20 the project which includes necessary approval of the project  
21 route. That certification authorized under the NGA, the cited  
22 section, Columbia as certificated pipeline company, to acquire  
23 all necessary right-of-way. So it doesn't say go get that  
24 property, that property. The right-of-way -- because you have  
25 to remember, when you're talking about a pipeline, it's point

1 A to point B. You've got to take it from the source to the  
2 delivery point. Without all the property between, it's not a  
3 pipeline, right? I mean, it's stating the obvious. And if  
4 the State happens to own a piece in the middle which they do,  
5 it doesn't give us anything if we don't have the right to  
6 acquire all necessary property. And that's understood in the  
7 context of the NGA and any type of, you know, railway or  
8 telecommunication or any kind of project like that where  
9 you've got to acquire a right-of-way to communicate from one  
10 point to another.

11 So in our case, we had this federal agency that has  
12 approved our project authorizing us to condemn. And as we  
13 talk about in Kohl and Carmack and Mississippi Boom, the  
14 delegated right of eminent domain under those cases which  
15 expressly recognize the right to delegate the sovereign's  
16 right and exercise the sovereign's right of eminent domain --

17 **THE COURT:** Over a private -- definitely over  
18 private citizens.

19 **MR. FEDDER:** Doesn't differentiate.

20 **THE COURT:** Right, exactly. And that's where maybe  
21 the ambiguity comes in.

22 **MR. FEDDER:** Well, only because -- only because one  
23 has been suggested improperly, Your Honor, and I'll circle  
24 back again --

25 **THE COURT:** Right.

1           **MR. FEDDER:** --to guess what case? Sage. But it  
2 doesn't have all the answers, but it's got a lot of them. But  
3 the difference -- the point I was trying to make was so the  
4 federal agency, so Alden was saying you can't -- what we're  
5 trying to protect against is the Federal Government can't just  
6 authorize unspecified citizens to go out and exercise its  
7 power without control. I mean, you can't go do that. What  
8 Chao, the case Your Honor asked about, inquired about a moment  
9 ago did when it affirmed the District Court decision was look  
10 to the underpinnings and looked at all of them and said, this  
11 passes the Alden test because the Secretary of Labor reviewing  
12 this case, deciding it's one that she would file, taking  
13 responsibility for it, satisfies that standard. It's the same  
14 thing here, if you get to that level. Because here, FERC has  
15 done the authorization. And we're not done with FERC by any  
16 means. These projects are FERC controlled and supervised from  
17 the beginning and for the life of the project, which means  
18 they are, you know, they tell us when we can proceed. They  
19 monitor construction. We are regulated through the life of  
20 the project. So we're not just turned out in the world and  
21 authorized to go condemn property and do with it what we want  
22 at all. So this is exactly what Alden as applied by Chao was  
23 saying is okay. The only piece that's not there is it's not  
24 being filed by the Secretary of the Department of the Interior  
25 if that was a possibility, but the difference is --

1           **THE COURT:** Well, it could be a possibility. I  
2 mean, the Secretary of Department of Interior can do that. I  
3 don't think there's any question about that.

4           **MR. FEDDER:** Possibly, Your Honor, but what I'm  
5 saying is that we don't need that because the difference  
6 between this and an action under the Fair Labor Standards Act  
7 is we have been delegated the sovereign's power of eminent  
8 domain which is an inherent right, independent of the  
9 Constitution, independent of States' consent as recognized by  
10 the U.S. Supreme Court back from the late 1800s. It's  
11 different. So that's why this is fundamentally different than  
12 all of that.

13           But here's where Sabine -- and I don't know exactly  
14 -- I don't know what happened. I would love to hear  
15 subsequent history more factually than legally, because  
16 literally it ended with the District Court opinion.

17           But the difference with Sabine, Your Honor, is in  
18 their case they hadn't gone through the FERC regulatory  
19 process. That project was from the 1960s. It was constructed  
20 under FERC's predecessor under what's called a blanket  
21 certificate. So the project that was at issue in that  
22 condemnation had not been specifically reviewed, certificated  
23 and approved. The property that was at issue at the time that  
24 it was certificated wasn't owned by the state. It was  
25 subsequently transferred to the state. So there are enough

1 differences there factually. I don't know if that played a  
2 factor or not, but you can see where that might start as a  
3 jumping off point where it's so different, that from this  
4 where it could lead one down a different Alden path if that's  
5 where somebody was inclined to go.

6 But our point is, you don't need to go there at all  
7 because they missed it so badly with the application of Kohl  
8 and Carmack and Mississippi Boom, that ends it. But then  
9 after that, then they applied Fourth Circuit Law. That should  
10 have ended it, and then for all the other reasons we talked  
11 about.

12 I think there are a couple other little sound bites  
13 here about the fundamental distinction.

14 **THE COURT:** Let me ask you this, Columbia Gas is  
15 asking for not to maintain the status quo. They're asking to  
16 do anything but maintain the status quo. In other words, be  
17 disruptive to the property that's owned by the State of  
18 Maryland and it's citizenry. Isn't that kind of injunctive  
19 relief that is being sought one that the District Court should  
20 exercise extraordinary care in disrupting the status quo  
21 related to this? In fact, I think what's going to happen --  
22 if you could articulate for me the practical aspects of this  
23 that there are going to be back loaders and drills and all  
24 sorts of heavy equipment that is going to be traipsing over  
25 Maryland's property, drilling is going to begin, that sort of

1 disruption. Doesn't the case law suggest that that kind of  
2 affirmative relief is something that the Court should  
3 exercise, be very, very cautious in exercising authority over?

4 **MR. FEDDER:** Your Honor, absolutely. And we would  
5 never suggest to the Court that granting extraordinary relief  
6 like an injunction should be anything other than very cautious  
7 and --

8 **THE COURT:** Well, it's one thing to maintain the  
9 status quo. It's another thing digging up and putting in a  
10 natural gas pipe and undermining the autonomy of the state of  
11 Maryland and its citizenry. It's a very serious aspect of  
12 this at a preliminary level when I haven't even reached the  
13 final merits of the case, taking away the sovereign's property  
14 is -- without a ruling on the merits and digging it up is  
15 extraordinarily serious.

16 **MR. FEDDER:** Yes, Your Honor. And we understand and  
17 we appreciate that. We have at pages 20 through 22 primarily  
18 in our memorandum in support of preliminary injunction  
19 summarized the primary contemporary law supporting our  
20 position on the award of affirmative mandatory injunctive  
21 relief at this very stage in the proceedings. And quoting  
22 from -- it's one of my favorite -- one of my other favorite  
23 cases in the Fourth Circuit from Judge Copenhaver recently in  
24 the Southern District of West Virginia and we're on page 21.  
25 He wrote or recognized that the paradox that the NGA presents

1 that relief as extraordinary as preliminary injunction relief  
2 is granted so ordinarily -- so he recognized that paradox --  
3 but found that the paradox notwithstanding on preliminary  
4 injunction was warranted as, quote, there are no unique  
5 circumstances that would place Mountain Valley outside the  
6 ambit of those cases. And he had collected -- it was a page  
7 worth of cites to recent cases primarily from the Fourth  
8 Circuit. It's the nature, Your Honor, of these -- the timing  
9 of the FERC process, when these are issued and the timeline is  
10 outlined in Mr. Haney's declaration and the construction  
11 process that must follow, that pipeline companies can't wait  
12 until just compensation is finally adjudicated on the merits a  
13 year-and-a-half to two-and-a-half years after the filing of  
14 the lawsuit to begin construction, which is when they would  
15 get access under the law. I mean, the title is not going to  
16 transfer until they pay the money in to court and take title.

17 **THE COURT:** Well, you can't have access, you can't  
18 complete the project anyway because you don't have the other  
19 three tracts.

20 **MR. FEDDER:** That's a risk we're running and we're  
21 running it to the ground and we've addressed it in our  
22 declaration. And there's always -- there are always things in  
23 construction that you're chasing down at the last minute, but  
24 high confidence level and -- it's another federal agency, so  
25 FERC will at the appropriate time, we believe, hopefully bring

1 their resources to bear because there is federal precedent  
2 they cited.

3 **THE COURT:** Maybe not.

4 **MR. FEDDER:** Well, maybe not. We can't guarantee  
5 it.

6 **THE COURT:** Maybe the Maryland Department of -- no,  
7 Maryland Department of Environment approved this and yet still  
8 the public works denied approval of the project.

9 **MR. FEDDER:** No, that's true, Your Honor, but we are  
10 exercising the federal power and it's footnote --

11 **THE COURT:** And by the way, it's going to have to go  
12 to the merits, isn't it? This is going to have to go to the  
13 merits. I mean, I think the Fourth Circuit has made clear and  
14 this is something that I'll have the Government address -- the  
15 Fourth Circuit has made clear in a couple of cases, the  
16 Washington Metro Area Transit Authority case that Rule 71.1  
17 simply basically has no other pleadings beside the answer  
18 that's contemplated. So I'm not quite sure this pending  
19 Motion to Dismiss is even appropriate. So then that leaves  
20 just merely an answer and going to the merits of the case,  
21 right?

22 **MR. FEDDER:** But today we're taking up my  
23 understanding, Your Honor, all outstanding motions which  
24 includes our Motion for Preliminary Injunctive Relief. So  
25 typically the posture we're in without a challenge for



1 jurisdiction is we would be before the Court on our pending  
2 motion for order of condemnation and for preliminary  
3 injunction.

4 **THE COURT:** Right, but I'm just dealing with the PI  
5 right now today.

6 **MR. FEDDER:** Right. So upon issuance of the PI, we  
7 deposit into the registry of the Court the amount set by the  
8 Court and then we post the injunction bond and then take  
9 access to the property and begin construction. There's case  
10 law under -- it's in Sage again -- that talks about because  
11 property owner said well, what happens if they abandon and go  
12 away during construction? What happens to us then? We're not  
13 protected because they don't own the property yet. And the  
14 case law in Sage says well, then they're a trespasser and if  
15 they damage you there, they owe you damages. That was the  
16 answer to the specific challenge raised by the Fourth Circuit.

17 So coming back to your other question, Your Honor,  
18 about what happens to their property --

19 **THE COURT:** And there wouldn't be any immunity  
20 issues from the Federal Government standpoint, they'd just sue  
21 Columbia Gas, right?

22 **MR. FEDDER:** Your Honor, we face claims from  
23 property owners. You know, it's a common thing on pipeline  
24 construction.

25 **THE COURT:** But they couldn't sue the federal --

1 that's a whole another issue, whether or not they could sue  
2 the Federal Government for damage caused by a burst natural  
3 gas pipeline even though the Federal Government delegated the  
4 responsibility to Columbia Gas and Columbia Gas would be  
5 accused of not constructing things properly. But then would  
6 the citizenry of Maryland be foreclosed from suing the  
7 Secretary of Interior directly if, in fact, bad things  
8 happened?

9 **MR. FEDDER:** Your Honor, I am but a poor  
10 condemnation lawyer.

11 **THE COURT:** No, I'm just thinking sort of around  
12 these alternative theories.

13 **MR. FEDDER:** I don't know the answer to that one,  
14 Your Honor. But coming back to where we started the  
15 discussion before I lose the second point is -- the first is  
16 that this paradox recognized by Judge Copenhaver is these  
17 mandatory injunctions, the ones the state acknowledges in  
18 their briefing, they acknowledge that we've satisfied the  
19 standards by our allegations, but for their sovereign immunity  
20 challenge. But that the case law fits our allegations and  
21 that they recognize but for the fact that it's state-owned  
22 property and they say we can't condemn it at all, otherwise --  
23 and I don't want to put words in their mouth, but basically I  
24 think that's, I think, the gist of their pleadings. They  
25 recognize this is the norm. These are all mandatory

1 injunctions that are issued. All the ones that are cited in  
2 our brief, all the ones Judge Copenhaver has. That's just  
3 what happens in these NGE cases.

4 As far as the actual construction on this property,  
5 this is what's unique here, Judge. You asked about the MDE  
6 permit, the Maryland Department of the Environment. So this  
7 construction that's going to take place -- and it's described  
8 in better detail in the two declarations submitted by Mr.  
9 Haney in support of our filings. So to the extent I'm  
10 inconsistent, I'm going to rely on those declarations. But  
11 the drill for the deep -- it's a horizontal directional drill.  
12 So first and foremost, there will be no disturbance in any  
13 manner of any property that's owned by the State of Maryland  
14 or the Maryland Department of Natural Resources. Not going to  
15 be touched. The drill entry point is in West Virginia.  
16 They're going to start and it goes under the ground. It's  
17 going to go under the Potomac River and I think when it goes  
18 under the Potomac it's about a depth of 114 feet. About 800  
19 feet past that point, then it crosses underneath the Rails to  
20 Trails tract at a depth of about 175 feet. And that's a  
21 distance of about 102 feet, so we're talking about a 102-foot  
22 long easement at that point. And that's going to continue  
23 along past any Maryland state-owned property. -

24 **THE COURT:** Have you been out to the tract?

25 **MR. FEDDER:** This one, no. I've seen the aerials.

1           **THE COURT:** Give me a perspective. Is it from this  
2 wall to the back wall? I'm just curious what the perspective  
3 is.

4           **MR. FEDDER:** Do we have Exhibit 1? Do you mind if I  
5 show that demonstrative, guys, that I showed you? We have a  
6 route exhibit that might give us a little bit of -- so Your  
7 Honor, I'm going to put these screens on here, what has been  
8 marked as --

9           **THE COURT:** We're talking about a little over 100  
10 feet, right?

11          **MR. FEDDER:** Well, the actual pipeline is -- or the  
12 actual easement underneath the Rails to Trails pipeline --

13          **THE COURT:** That's an aside from the legal argument.  
14 I was just curious.

15          **MR. FEDDER:** Sure, I think it's always helpful to  
16 see what we're talking about here, but so you can see the  
17 river that once we get it focused here a little better.

18          **THE COURT:** There we go.

19          **MR. FEDDER:** Okay. It helps when you read it the  
20 correct way. Thank you. It's labeled. There you go. So you  
21 see the entry point on the West Virginia labeled parcel, the  
22 bottom right of the exhibit.

23          **THE COURT:** Right.

24          **MR. FEDDER:** Then we cross the river. And then you  
25 can see what's been labeled as the Western Maryland Rail Trail

1 Tract. And then you can see where the approximate exit point  
2 has been identified.

3 **THE COURT:** Gotcha.

4 **MR. FEDDER:** And this is as close as could be  
5 approximated on an aerial. But the point of it is that as far  
6 as concerns of the State of Maryland and the citizenry about a  
7 massive disruption and what's going to happen if the State  
8 grants injunctive relief, nothing in any manner whatsoever  
9 that anybody in the State of Maryland would ever know at all.  
10 I mean, you will not know with an 8-inch line being installed,  
11 175 feet beneath this tract that it's ever happened, that it  
12 was ever there. Period.

13 **THE COURT:** Well there was -- I note and again, it  
14 wasn't -- it may have been recorded, but I noted that in the  
15 teleconference earlier regarding scheduling, there was -- I  
16 may have raised an issue regarding the tract and there was  
17 some concern -- and I don't want to put words in the mouths of  
18 the State -- but there was some concern that some  
19 environmental precautions that had been recommended were not  
20 being implemented by the Federal Government or Columbia Gas or  
21 that there were some concerns regarding -- there were concerns  
22 regarding the environmental impact. Whether or not it's 100  
23 feet or 100 acres really is irrelevant and I get that. But  
24 there were some issues regarding the environmental issue. But  
25 I don't think the State is really raising it. The State's

1 raising as their balance of equities and argument that look,  
2 the Federal Government through its delegees is taking away  
3 states' rights in invading on our sovereign immunity without  
4 the express permission of Congress through its enforcement  
5 powers. And they can't -- the Supreme Court said hey, we  
6 can't delegate it or they've expressed skepticism regarding  
7 delegation and there's no abrogation and they're saying, you  
8 know, our citizens have a real significant interest in  
9 protecting our sovereign and that's a pretty heavy preliminary  
10 order that this Court would be imposing, albeit the Government  
11 can do it to private citizens any way they want. Just  
12 comments.

13 **MR. FEDDER:** Right. One stray thought which I don't  
14 think I came back to when we talked a little bit about the  
15 interpretation of the delegation of the right of eminent  
16 domain to be circularly construed. There's a string cite in  
17 Counsel's briefing that was originally in the briefing or in  
18 the opinion from Sabine, which at the tail end cites to Sage.  
19 And I would just invite the Court to look at the actual  
20 language from Sage on that point as controlling, because it  
21 doesn't state the proposition the way it's being played  
22 forward. It's not a blanket statement about strict  
23 construction. It's talking about how you look at a grant of  
24 power. And here the grant of power has no limitations on it.  
25 The grant of power that's expressed in the NGA is pipeline

1 companies upon certification by FERC, can acquire the  
2 necessary right-of-way from the owners.

3 **THE COURT:** And do you believe that that is -- you  
4 believe that the likelihood of success on the merits is clear  
5 and substantial?

6 **MR. FEDDER:** Yes. I believe that this case is no  
7 different than any of the other cases where as the State  
8 stipulates on private parties that own property, that it's a  
9 given that likelihood of success on the merits is -- it's a  
10 certainty. I think it's self-executing. We don't think  
11 there's any difference under a proper analysis of the  
12 constitutional rights at play that you don't go down this path  
13 of -- the right has been delegated, the right of eminent  
14 domain and that right of eminent domain is rendered nugatory.  
15 It's meaningless unless you interpret it correctly to include  
16 that it's superior to the State's rights. Because if the  
17 State has the right to say, no then there's no pipeline.

18 **THE COURT:** Now let me ask you this, there's no  
19 question that Columbia Gas is incurring and will incur  
20 significant financial losses as a result of the failed  
21 implementation of the preliminary injunctive relief that  
22 they're seeking. And putting aside the three tracts that  
23 haven't been acquired, that certainly is a significant harm.  
24 But balancing the precedent and harm to the state, to a state  
25 and its citizenry for the purposes of preliminary relief is

1 pretty significant as well. Correct?

2 **MR. FEDDER:** I don't --

3 **THE COURT:** Waivers of sovereign immunity should be  
4 taken very, very seriously.

5 **MR. FEDDER:** Which is why we're discussing it now as  
6 a preliminary matter, Your Honor. I don't know that it's a  
7 proper counterbalance to the other factors I guess is the  
8 reason. We tried to articulate that in our briefing. We're  
9 not saying that this shouldn't be discussed and that His Honor  
10 shouldn't take it up first. I think the sovereign immunity  
11 challenge needs to be addressed and disposed of first. But  
12 once that's disposed of, then there is no counterbalance to  
13 the other preliminary injunctive prongs. That's the reason  
14 why they say we're not entitled to injunctive relief and I  
15 don't think that's really a challenge to injunctive relief. I  
16 think it's a challenge to jurisdiction for these proceedings  
17 to go forward. And it's not form over substance because I  
18 think that otherwise it just invites us to have a second  
19 proceeding about injunctive relief after this. And we had a  
20 brief conversation. I'm not going to put words in Counsel's  
21 mouth, but I don't think anybody envisions a knock-down  
22 drag-out on evidentiary matters on the injunctive relief  
23 factors after the Court disposes one way or the other of  
24 sovereign immunity. If the State wins, we're done and we'll  
25 have to decide what we do at that point. If we win, then the



1 State has to decide what they're going to do and we go forward  
2 with the project, assuming the Court grants also the  
3 injunction.

4 But just kind of to if I could just put a bow on a  
5 couple of those points.

6 **THE COURT:** Please.

7 **MR. FEDDER:** I think I'm about done, Your Honor.  
8 But you'll tell me when I'm done, but --

9 **THE COURT:** No, no, no, these are very important  
10 issues and I want to make sure that -- I want to make sure I  
11 understand the points. And that's why I'm asking questions  
12 and I asked you to repeat certain things because I'm really  
13 trying to take care in understanding.

14 **MR. FEDDER:** I was driving my team somewhat crazy  
15 this past week because my thinking on some of these points has  
16 been evolving because I keep looking at things and reading  
17 them and drilling down like I said to the case under the case  
18 under the case to kind of figure out where things went.

19 **THE COURT:** You thought of things first thing this  
20 morning, didn't you?

21 **MR. FEDDER:** Some of it, and then I read Sage again  
22 and it all came to me.

23 So in going back to Kohl again, so what Kohl had  
24 asked was if the United States has the power and the power of  
25 eminent domain, it says it must be complete in itself. It can

1 neither be enlarged nor diminished by the State, nor can any  
2 state prescribe the manner in which it must be exercised. The  
3 consent of a state can never be a condition proceeding to its  
4 enjoyment. That's at page 374. The powers vested by the  
5 constitution and the general Government demand for their  
6 exercise the acquisition of lands in all states. If the right  
7 to acquire property for such uses may be made barren by right  
8 -- by right by the action of a state prohibiting a sale to the  
9 Federal Government, the constitutional grants of power may be  
10 rendered nugatory and the Government is dependent for its  
11 practical existence upon the will of a state or even upon that  
12 of a private citizen.

13 **THE COURT:** Isn't that where the Federal Government  
14 comes in, though?

15 **MR. FEDDER:** Right.

16 **THE COURT:** As opposed to the delegation to a  
17 private company?

18 **MR. FEDDER:** This is the underpinning telling us why  
19 eminent domain is so fundamentally different than all those  
20 other Fair Labor Standards Act, and ADEA cases. Yes, Your  
21 Honor. So that's why this is a different animal. And then --

22 **THE COURT:** Nobody is disputing the Federal  
23 Government can come in.

24 **MR. FEDDER:** Well, but it's not just that the  
25 Federal Government can do it. It's the nature of that which

1 they are doing and why it's this inherent right independent of  
2 the Constitution. It's an inherent right of the sovereign.

3 **THE COURT:** Isn't there something to be said for the  
4 Federal Government intervening because they have to take some  
5 political responsibility for this and that shouldn't -- in  
6 taking of a state sovereign land should only be done by the  
7 Federal Government and not somebody that the Federal  
8 Government ended up designated or appointing through a bidding  
9 -- how is it that Columbia Gas got this in the first place?  
10 Was it an open bidding process?

11 **MR. FEDDER:** A bidding process is part of what FERC  
12 looks to to justify -- this one is a little different because  
13 it was a market driven by their end user Mountaineer Gas, but  
14 in the typical project there's an open season bidding process  
15 that is lengthy that goes into play and they have to  
16 demonstrate a lot of competitive factors.

17 But you just hit the nail on the head, Judge. The  
18 Federal Government has taken responsibility. FERC -- we can't  
19 just say I want to condemn a piece of property. It's a very  
20 lengthy, expensive, exhaustive process and it's described in  
21 detail in the FERC certificate itself. And it doesn't even  
22 hit all the high notes about what has to be done in order to  
23 become a FERC-certificated project. And it's only with that  
24 project in hand then can under the Natural Gas Act as amended  
25 to fix problems that were being caused by states not letting

1 the pipeline companies condemn or acquire the right-of-way  
2 through state law, when Congress amended the Act in 1947 to  
3 give them the federal power of condemnation to delegate that  
4 federal right. It's not a new right. It's not a new statute,  
5 it's just you may exercise eminent domain which is just here,  
6 use our right. That's what they were trying to do. And  
7 there's nothing in when you look at Sage about the grant of  
8 the power, there's no limitation except as to state property.  
9 There's no words of limitation to be construed from that. And  
10 if you go to some of their cases talk about what can be  
11 necessarily implied, you can't by implication imply states out  
12 of there because it would render like Kohl said, it would  
13 render it nugatory. The grant is meaningless. You can't get  
14 the whole right-of-way if you can't -- if I can't connect  
15 point A to point B because the state owns the middle, then I  
16 don't have a right-of-way.

17 **THE COURT:** Well, you don't have the whole  
18 right-of-way right now.

19 **MR. FEDDER:** Yeah, exactly.

20 **THE COURT:** I mean --

21 **MR. FEDDER:** Right.

22 **THE COURT:** You're missing three parcels.

23 **MR. FEDDER:** Well, but --

24 **THE COURT:** You're saying oh, it's the Federal  
25 Government so we're just going to get them, Judge, so it's no

1 worries. But obviously there's a hold up because you don't  
2 have them. They wanted more information, right?

3 **MR. FEDDER:** Well, all I can say to that, Your  
4 Honor, is there's always a process.

5 **THE COURT:** Oh, I thought you said in the beginning  
6 of this -- that's why I asked the status because it sort of  
7 doesn't change the legal dynamic of what we're talking about.

8 **MR. FEDDER:** No.

9 **THE COURT:** But to a certain extent it does with the  
10 irreparable harm, but it points to -- it's not a gimme. In  
11 other words --

12 **MR. FEDDER:** Well --

13 **THE COURT:** You don't have them and they asked for  
14 more information, so --

15 **MR. FEDDER:** My point was we're not there yet. If  
16 you can look to, Your Honor, at page 35 of the FERC  
17 certificate which is appended as an exhibit to our  
18 condemnation complaint, in Footnote 171 it's --

19 **THE COURT:** Hang on, let me get there.

20 **MR. FEDDER:** Sure.

21 **THE COURT:** Okay, so I got the FERC certificate  
22 here.

23 **MR. FEDDER:** So page 35.

24 **THE COURT:** 35. Yes, all right. I'm there.

25 **MR. FEDDER:** Footnote 171.

1           **THE COURT:** Got it.

2           **MR. FEDDER:** So here FERC is setting forth what's  
3           black letter law and actually the State cites to some Fourth  
4           Circuit law about preemption in their filing talking about how  
5           the state and federal regulatory and statutory law is  
6           preempted by federal law in the field of natural gas  
7           regulation and the matters that are at hand.

8                     But the law I'm pointing to, Your Honor, is from the  
9           DC Circuit down below. Knowing the state and local regulation  
10          is preempted by the NGA, the ascendant conflicts with federal  
11          regulation that would delay the construction and operation of  
12          facilities approved by the Commission. And I'm not saying  
13          that that's dispositive, all I'm saying is there's law out  
14          there and the agencies know that at the end of the day, this  
15          is a FERC regulated and approved project. They're working  
16          cooperatively together. No one is taking a position like the  
17          State is taking no, you cannot build this under any  
18          circumstances. The permits are getting issued and our company  
19          who is in the business of building these pipelines and has  
20          built many, many projects, has a high confidence level they're  
21          going to get it within the timeline they need. But they're  
22          not in a situation -- in a position where they can wait until  
23          that timeline closes to come to you at that point and then  
24          have this fight. So that was my only point.

25          **THE COURT:** Okay.

1           **MR. FEDDER:** So I don't have a crystal ball, but we  
2           have a high confidence level based on that, based on how the  
3           agencies work with each other, based on our understanding of  
4           the process from other processes that we're well situated.

5           **THE COURT:** Um-hum, okay.

6           **MR. FEDDER:** Factually.

7           So we had talked about some of the cases about -- I  
8           want to talk about a few of the cases where there have  
9           actually been delegations which the State ignores in their  
10          brief, just to give the Court a better comfort level that  
11          we're not just out here on our own. We cite to one of them in  
12          our reply and the State distinguishes it, but they actually  
13          misstate the holding of it in their treatment of the case.  
14          And that is a Seventh Circuit case -- going out of order here  
15          a little bit if you'll bear with me, Your Honor.

16          **THE COURT:** Take your time.

17          **MR. FEDDER:** It's the City of Davenport versus 3/5  
18          of an Acre of Land, Seventh Circuit from 1958. So in that  
19          case, the Federal Government had delegated the federal right  
20          of eminent domain by an act of Congress to the city of  
21          Davenport to build a bridge, I think it was across the  
22          Mississippi River. The city of Moline -- the city, not a  
23          state -- but the city of Moline opposed the project. We know  
24          cities can't raise Eleventh Amendment statutory immunity, but  
25          the city came up with theories by which they were acting on

1     behalf of the State and its citizens saying the streets and  
2     other things are going to be affected by the project were held  
3     in trust for the State and the State's citizens. And they  
4     raised in the Eleventh Amendment among other things, challenge  
5     to the exercise of the power of eminent domain by the entity  
6     that had been delegated the authority by an act of Congress.  
7     Okay? So very similar to us, not the NGA, but federal  
8     delegation, Eleventh Amendment immunity.

9             **THE COURT:** To a public entity.

10            **MR. FEDDER:** Well, right. But I've got a couple  
11     instances.

12            **THE COURT:** Not a private company.

13            **MR. FEDDER:** Okay, but I've got some instances, but  
14     it's not the Federal Government. It's a delegation to  
15     somebody other than the Federal Government is my point. So  
16     it's, you know, the point is can they delegate to somebody  
17     here and here they said they could. But in response, in  
18     holding, the project could go forward and reject the Eleventh  
19     Amendment claim, the Seventh Circuit held, the fact that land  
20     is owned by a state is no barrier to its condemnation by the  
21     United States. So they didn't say by the city of Davenport,  
22     they said by the United States. So that's a very good  
23     example. Two other cases --

24            **THE COURT:** Now what's the cite on that case?

25            **MR. FEDDER:** Yes, Your Honor. It appears in our



1 brief at -- just if it's easier -- at pages 3, 9 and 10 in our  
2 reply. But it is City of Davenport versus 3/5 of an Acre of  
3 Land, 252 F.2d 354. And the quote that I just read was at  
4 356.

5 And there's two other cases which we identified in  
6 our opening brief, but our opponents didn't address at all in  
7 their response. There's a case, a U.S. Supreme Court case  
8 from 1941, State of Oklahoma ex rel. Phillips versus Guy F.  
9 Atkinson Company, 313 U.S. 508. And in that case it was  
10 state-owned land that was being condemned to effectuate a  
11 private company's construction of a dam that served public and  
12 private purposes, both. And the State raised challenges  
13 saying it was being done for the benefit of private citizens,  
14 improper delegation, improper condemnation. And the Court  
15 recognized there's no interference with sovereignty of the  
16 state when state-owned land was being condemned to effectuate  
17 a private company's construction of a dam that served public  
18 and private purposes.

19 And then in Stockton versus Baltimore which is a New  
20 Jersey district case from 1887, that's 32 F.9, in that case  
21 rejecting a challenge by the State of New Jersey, again  
22 another bridge. People don't like bridges. There is nothing  
23 in the constitution to prevent Congress from inferring powers  
24 upon state corporations for carrying out Congress' own  
25 legitimate purposes. What right of a state would be invaded.

1 And there the state corporation, it was a private corporation  
2 of another state and they were trying to say that's a private  
3 citizen of another state violating the Eleventh Amendment.  
4 The Court said no, not a violation. And this was -- it was  
5 interesting, Stockton versus Baltimore, it was a Supreme Court  
6 Justice on circuit sitting in the Court that made this  
7 opinion. I don't have his name written here, but it was made  
8 note of in the Carmack opinion that the State cites. This I  
9 think is instructive for our purposes here too. It says it  
10 was explained by the Court that its conclusion was further  
11 supported by the practical necessity of interstate activities  
12 and the federal supremacy and the fact that private company  
13 acting pursuant to a lawful act of Congress was standing in  
14 the shoes of the Federal Government exercising the same  
15 sovereign power to the same extent as if it were exercised by  
16 the Federal Government itself. There's a, quote, dilemma of  
17 requiring the consent of the State in almost every case of  
18 interstate line of communication by railroad, for hardly a  
19 case can arise in which some property belonging to a state  
20 will not be crossed. Period, close quote. That's pages 17  
21 and 18. That could have been written for our case, Judge.  
22 That's exactly what we're talking about here today. Mr.  
23 Haney's supplemental affidavit that was submitted, he's  
24 affirming that you can't route an interstate pipeline project  
25 without crossing state-owned property. State's-owned

1 highways, state's-owned parks, state's-owned rivers,  
2 state's-owned, you know, all kinds of things. In New Jersey,  
3 they're going out and creating protective barriers. They're  
4 literally buying up ground to prevent pipelines. Given what  
5 the State here has articulated as the real purpose -- they're  
6 saying sovereign immunity, but at the tail end of their brief  
7 they talk about the purpose of the Board of Public Works' anti  
8 -- no vote was anti-fracking and fossil fuel concerns. What's  
9 to say that Maryland is not going to start doing the same  
10 thing?

11 So this is exactly what is talked about from those  
12 old cases, from this case. It's not just that they've got a  
13 25-mile long rail trail that creates an effective barrier to  
14 this pipeline, it's anywhere they are, and any other  
15 state-owned interest. Unless it's recognized that the  
16 inherent sovereign power of eminent domain includes the right  
17 to build the pipeline as certificated by FERC, it's  
18 meaningless.

19 **MR. FEDDER:** Right.

20 **THE COURT:** Right, and well, I guess to a certain  
21 extent we may be in another age right now where the Federal  
22 Government has to intervene. I'm not -- I'm listening to you  
23 and I haven't made any decisions yet, but clearly the Federal  
24 Government has a right to do what they're doing. It's just a  
25 question of whether or not they can designate Columbia Gas to

1 do it for them. Isn't that sort of broken down in a nutshell  
2 what we're talking about here?

3 **MR. FEDDER:** Your Honor, I think that -- I think  
4 that is a reaction like we've talked about, but I think it's  
5 also the response from Columbia -- and I can't speak on behalf  
6 of the whole industry -- is it's not a feasible position for  
7 us as we stand here today for this project whether it's a  
8 theoretical legal alternative at some point in the future  
9 possibly, but given the state of dysfunction with the Federal  
10 Government, I'm not sure when that point might be.

11 **THE COURT:** Well then I'm not -- then your optimism  
12 regarding getting the Government lands may not be that great  
13 either.

14 **MR. FEDDER:** We're operating at an agency level.  
15 It's a little bit easier, but I understand.

16 **THE COURT:** Understood. All right, is there  
17 anything else? And you'll have a brief -- I'll give you an  
18 opportunity for a brief rebuttal as well.

19 **MR. FEDDER:** Thank you, Your Honor.

20 **THE COURT:** But I've let Mr. Snyder sit there  
21 enough. Who is going to be arguing?

22 **MR. SNYDER:** I am.

23 **THE COURT:** Oh, you were sitting there quiet for  
24 about an hour-and-15 minutes, so --

25 **MR. SNYDER:** I'll be less quiet now.

1           **THE COURT:** Before you get started, Mr. Snyder --  
2 all right, Counsel.

3           **MR. SNYDER:** Good morning, Your Honor. You  
4 indicated at the beginning of your proceedings today that you  
5 read the materials and from your questions, you've backed that  
6 up. You definitely know the issues here, so I'm going to  
7 focus my remarks on some of the points that the Columbia Gas  
8 folks have made and then I'm sure, have the opportunity to  
9 answer questions you might have about the State's position.

10          **THE COURT:** Very good, thank you.

11          **MR. SNYDER:** We do concede that the Federal  
12 Government can condemn this property. As you indicated, we've  
13 kind of come close to that. I think we do say that in our  
14 pleadings, that if the Federal Government were here, if the  
15 Department of Justice were here to condemn this land, we  
16 wouldn't be here. They would clearly have that power and they  
17 have that power under existing law.

18               The Condemnation Act which can be found at 40 USC  
19 3113, already provides that an officer of the Federal  
20 Government authorized to acquire real estate for the erection  
21 of a public building or for other public uses may acquire the  
22 real estate for the Government by condemnation when the  
23 officer believes that it is necessary or advantageous to the  
24 Government to do so. The Attorney General of the United  
25 States exercises that condemnation authority and appears on

1       behalf of the United States in court. And it matters in the  
2       Eleventh Amendment context who the plaintiff is. You see that  
3       from Chao where as Your Honor pointed out, initially the  
4       private litigant was trying to obtain the relief, was  
5       dismissed twice, then the Federal Government came in as the  
6       plaintiff and the Eleventh Amendment argument goes away.

7               It is clear that FERC is involved in the planning of  
8       this process, but they are not involved in this lawsuit.  
9       They're not a party to this lawsuit, they're not sitting  
10      across the aisle. And that's the important thing. When you  
11      read Blatchford, it talks about a suit by the United States  
12      under the control of federal officers, politically responsible  
13      federal officers. It's not a project that is approved by. So  
14      the fact that the plaintiff here is a private company is  
15      dispositive for the Eleventh Amendment argument because as  
16      Alden v. Maine and Supreme Court cases repeatedly hold, the  
17      State has only consented to suits against -- brought by two  
18      types of plaintiffs, other states and the Federal Government.  
19      So unless you fit into one of those two categories, you can't  
20      be a plaintiff and sue the state.

21             Now Counsel talked about the Carmack case which  
22      plaintiff actually cited in their brief first. We then  
23      responded and elaborated on it and some discussion of the  
24      facts here might be helpful of Carmack. What went on in  
25      Carmack was the Federal Government, a federal condemnation

1 officer wanted to condemn a state courthouse or a local  
2 courthouse for purposes of a federal post office. And the  
3 defendants opposed that saying well, that's not appropriate  
4 for the Federal Government to condemn a public land like that.  
5 And the Supreme Court in footnote 13, a very long footnote,  
6 makes the point that when the Federal Government delegates its  
7 condemnation power to a federal officer, it delegates the full  
8 sovereign authority. But when it delegates that eminent  
9 domain authority to someone other than a federal officer, you  
10 don't get the full sovereign authority. It is a more limited  
11 authority and it is an authority that must yield to others who  
12 have a sovereign authority. So even within the world of  
13 eminent domain -- you can put aside the Eleventh Amendment --  
14 even within the world of eminent domain, the Federal  
15 Government when it delegates its eminent domain authority to  
16 private entities, delegates only a subset of its sovereign  
17 powers, not its full sovereign authority.

18 Now there was a lot of talk about the origin of  
19 eminent domain and the Kohl case. And what Kohl involved was  
20 whether the Federal Government had any eminent domain power on  
21 its own or did the Federal Government if it wanted to condemn  
22 land, did it have to go to a state in which the land is  
23 located and get the state's permission under state law to  
24 condemn the land or does the Federal Government have its own  
25 eminent domain authority? And the Court held that the Federal

1 Government has its own eminent domain authority, but so does  
2 the state. All sovereigns have that eminent domain authority.  
3 The question is, who can sue the State in order to take its  
4 property or to bring it into federal court? That's a  
5 different issue.

6 **THE COURT:** And that's distinguished in some of the  
7 case law. It's not whether or not there can be an exercise of  
8 eminent domain, it's a question of whether or not the state  
9 has waived or abrogated or otherwise consented to being sued  
10 by a private entity.

11 **MR. SNYDER:** That's right. Now you see that in the  
12 Court's abrogation jurisprudence, but you also see it in the  
13 waiver and consent jurisprudence. You have to find some sort  
14 of clear, unmistakable language that shows either that  
15 Congress intended to abrogate the State's immunity, or that  
16 the State has consented to suit in federal court. And here we  
17 don't hear any of that from Columbia Gas. There's no mention  
18 of the State having consented. It's all implied. It's all  
19 carried with the Federal Government's eminent domain power.

20 **THE COURT:** Pursuant to the Natural Gas Act which is  
21 an Article I statute and not expressly received or created as  
22 part of the enforcement clause of the Fourteenth Amendment.

23 **MR. SNYDER:** Right. I mean, Seminole Tribe  
24 establishes two requirements. There's the clear statement  
25 that we talk about in terms of abrogation, but there also has



1 to be a valid source of authority which has to be as Your  
2 Honor pointed out, Section 5 of the Fourteenth Amendment. It  
3 can't be Article I legislation like legislation like the  
4 Natural Gas Act that's enacted under the commerce clause.

5 So from an abrogation standpoint, they don't have an  
6 argument. I don't hear them making an argument as opposed to  
7 abrogation. I think they concede that. I think all of their  
8 eggs are in the delegation basket. And Blatchford clearly  
9 expresses great skepticism of that. Lower courts, including  
10 Chao have followed Blatchford and applied that language.

11 And I want to highlight one other court decision,  
12 the Supreme Court decision subsequent to Blatchford that  
13 amplifies this point, but in the qui tam context. And Counsel  
14 talked a lot about qui tam about how the Milam case by the  
15 Fourth Circuit and disagreed with by the Texas Tech case in  
16 the Fifth Circuit and that the law in the Fourth Circuit is  
17 that qui tam realtors can bring claims against the State.  
18 That was a 1992 Fourth Circuit case. In 2000, the Supreme  
19 Court issued a decision in Vermont v. Stevens -- Vermont  
20 Agency of Natural Resources v. U.S. ex rel Stevens, that's 529  
21 U.S. 765 where the Court said no, qui tam realtors can't sue  
22 the State under the False Claims Act because the State is not  
23 a person under that statute. Now they've ruled, they base  
24 their decision on statutory grounds in order to avoid the  
25 constitutional issue as to whether or not the Eleventh

1 Amendment would present a bar to such suits. So they avoided  
2 that. But the Court, the majority went on to say we, of  
3 course, express no view on the question whether an action in  
4 federal court by a qui tam realtor against the State would run  
5 afoul of the Eleventh Amendment, but we note that there is a  
6 serious doubt on that score.

7 So here you have the Supreme Court eight years after  
8 the Fourth Circuit decision in Milam, resolving that issue on  
9 different grounds, but saying there's a serious doubt whether  
10 private qui tam realtors could bring a suit against the State  
11 under the False Claims Act in federal court.

12 And the qui tam context is very different from the  
13 Natural Gas Act context because a qui tam realtor -- or the  
14 Federal Government has a continuing role to play in qui tam  
15 actions throughout the course of the litigation that FERC  
16 doesn't have here. FERC is not involved in this case in any  
17 way, but in a qui tam context the Federal Government has the  
18 right to intervene. They have the right to have a say as to  
19 whether the case is going to be settled.

20 There's several points within the lifetime of a qui  
21 tam proceeding where the Federal Government has a statutory  
22 role to play. None of that is present here. FERC has nothing  
23 to do with the conduct of this lawsuit.

24 Now Counsel referred to the Sabine argument and the  
25 State's position here is -- I think he used the term "smoke

1 and mirrors." But when you read Blatchford, it's clear that  
2 the smoke and mirrors is going the other way around here. The  
3 Supreme Court says in Blatchford that the reason why the  
4 litigants in that case were presenting this delegation  
5 argument was because they knew they couldn't satisfy the clear  
6 statement rule in the Court's abrogation jurisprudence.  
7 That's exactly where we are here. They know they can't  
8 satisfy that and so they're trying to circumvent that  
9 jurisprudence. And that's what would happen if this decision,  
10 if this issue were resolved in their favor. Because what  
11 would stop the Federal Government from just delegating its  
12 authority to sue the states generally? There's really no  
13 limiting principle here. The eminent domain, yes it stems  
14 from sovereignty, but the reason why the Federal Government  
15 can sue a state is because of the states enjoining the union,  
16 consented to suits by the Federal Government. And if the  
17 Federal Government can just willy-nilly delegate its authority  
18 in the eminent domain context, there's no reason why they  
19 wouldn't be able to delegate in other contexts and that gets  
20 squarely into the teeth of Seminole Tribe, Alden v. Maine,  
21 Atascadero, all of the numerous Supreme Court cases that say  
22 you can't hale the State -- the private party can't hale the  
23 State into federal court in the absence of consent or some  
24 sort of clear statement from Congress. And here there's  
25 nothing anywhere, there's nothing in the language of the

1 Natural Gas Act that suggests that Congress intended to  
2 abrogate sovereign immunity. There's nothing in the language  
3 of the Natural Gas Act that suggests that they intended to  
4 delegate its authority to hale the State into federal court.  
5 And that's why this delegation theory was described by the  
6 Supreme Court as a strange notion, because it just doesn't  
7 make sense either in terms of constitutional theory or in  
8 terms of common sense.

9 When the State consents to the Federal Government to  
10 suing in federal court, it does so because the Federal  
11 Government and federal officers are politically accountable in  
12 a way that private companies are not. They live by different  
13 considerations. There's again, political accountability, but  
14 there's also just how you're going to conduct the lawsuit may  
15 be completely different depending on who the plaintiff  
16 actually is. The States agreed to that, that concession to  
17 the Federal Government in the plan of the Constitution, but  
18 not to private entities.

19 And just as a matter of common sense, I mean, if I  
20 provide consent to you or anyone to say, you know, drive my  
21 car. You can't turn around and say well, I'm going to convey  
22 that consent to someone else and let them drive your car.  
23 That's not the way it works, particularly in the  
24 constitutional context where we're talking about federal  
25 actors who are politically responsible.

1           And ultimately here, a lot of what we're talking  
2           about is the dignity of the States as co-equal sovereigns.  
3           That what lay behind the Eleventh --

4           **THE COURT:** But they're not co-equal sovereigns.

5           **MR. SNYDER:** Fair point, as sovereign entities, yes.  
6           The states are co-equal themselves, but not with the Federal  
7           Government.

8           **THE COURT:** Correct.

9           **MR. SNYDER:** Supremacy clause. But the idea was  
10          that it would be an indignity and the Supreme Court talks  
11          about this a lot, an indignity to have states, sovereign  
12          states being haled into court by private entities. And that's  
13          where we are here. And the Supreme Court proceeding --  
14          Supreme Court jurisprudence just doesn't allow it.

15          Now you only have two cases that are addressing this  
16          issue within the Natural Gas Act. You have the PennEast case  
17          and you have the Sabine case. And as Your Honor pointed out,  
18          the PennEast case is one paragraph with no analysis and  
19          doesn't even mention Blatchford anywhere. Then you have the  
20          Sabine case that goes into this in great detail, looks at it  
21          from all different angles and concludes that suits exactly  
22          like this one because of Blatchford and its progeny, cannot be  
23          brought under the Eleventh Amendment. And this Court should  
24          rule the same way. And if it does, we don't have to have a  
25          hearing on the merits as Counsel has acknowledged, that if the

1 State is right about its Eleventh Amendment argument, that's  
2 the end of this case because the Court doesn't have subject  
3 matter jurisdiction.

4 Your Honor, if you have questions, otherwise I'll  
5 conclude.

6 **THE COURT:** Thank you. Mr. Fedder, last word.

7 **MR. FEDDER:** A couple very brief points, Your Honor.  
8 Counsel didn't touch, because he can't, this issue about in  
9 the Fourth Circuit, how do you explain in the qui tam context  
10 somebody other than the Federal Government can bring suit and  
11 withstand challenges on a sovereign immunity basis as a  
12 delegated power and under this clear on the face of the  
13 statute, it has to be evidence of abrogation. The reason  
14 Stevens overturned it as Counsel does state is because the  
15 State was not deemed to be a person as defined by the False  
16 Claims Act. So as far as the standing to bring a claim in a  
17 delegated or representative capacity in the Fourth Circuit,  
18 the qui tam cases still stand for that proposition.

19 The Chao case as we discussed in detail, didn't just  
20 simply dispose of the issue of sovereign immunity based on the  
21 fact that the Secretary of Labor brought the renewed claim, it  
22 went into the analysis of why it was actually an act of a  
23 responsible party. It wasn't a summary rejection. It was  
24 looking past the name of the party to the substance of the  
25 degree of responsible control of the party. And as we

1 discussed, we believe that the FERC control here and oversight  
2 in the process more than satisfies that if we get to that  
3 level of the analysis, and that distinguishes us.

4 But more importantly, Your Honor, this --

5 **THE COURT:** FERC isn't involved in any way in this  
6 litigation; is that correct?

7 **MR. FEDDER:** I'm sorry?

8 **THE COURT:** FERC is not involved in any way in this  
9 litigation.

10 **MR. FEDDER:** Specifically in the litigation no,  
11 Judge, but it was the FERC act of the certificate that got us  
12 here and when we get the right-of-way hopefully with issuance  
13 of the injunction, we have to then go to FERC to get a notice  
14 to proceed. FERC monitors each and every step of the process  
15 of the construction of the project. So to say that FERC isn't  
16 involved, FERC is involved. FERC is very much cognizant of  
17 the prosecution of every stage of this. And if something  
18 controversial or untoward happened in the course of the  
19 prosecution of the litigation, you can bet FERC would be aware  
20 of it. And to say that FERC is done with this upon our filing  
21 of the lawsuit is inaccurate. They're not a party to the  
22 lawsuit though, no.

23 But if we could just circle back to delegation, a  
24 couple of the cases that we talked about, the Supreme Court in  
25 the Mississippi River Boom case at page 406, expressly states

1 the Supreme Court has said that the power of eminent domain  
2 can be delegated to private corporations. This is not  
3 anything that is controversial or in dispute. And that is the  
4 case that Sage relies on to affirm in the NGA context.

5 Kohl states, when that right is delegated, the power  
6 does not change by a transfer to another holder. That's at  
7 page 372.

8 The footnote that Counsel keeps coming back to from  
9 Carmack, that footnote 13, you have to read it carefully but  
10 what it says is if the rights aren't limited, you get all the  
11 rights that are delegated that are express or necessarily  
12 implied, so -- unless there are conflicting rights of a  
13 sovereign. There are no conflicting rights here other than --  
14 superior sovereign rights aren't conflicting. They're saying  
15 if they're at play we can't condemn. That's not a conflicting  
16 right. They are a sovereign. Our sovereign rights are  
17 superior. There is a host of superior sovereign litigation  
18 out there. That's where Carmack actually goes through and  
19 talks about the superiority of the federal power of eminent  
20 domain over state. And it does a very nice job of explaining  
21 why the federal power is supreme. What Counsel is doing is  
22 mixing concepts. Federal power is supreme. The federal power  
23 can be delegated. Boom tells us when it's delegated, the  
24 sovereignty still attaches. It doesn't then become a private  
25 right of eminent domain. It's still the federal power of



1 eminent domain. What that footnote from Carmack tells us,  
2 unless it's expressly limited, you get the rights that are  
3 expressly transferred and those that are necessarily implied.  
4 And our point is to make the grant of eminent domain  
5 effective, it has to be if it's not expressed, necessarily  
6 implied that you have to have the ability to condemn the whole  
7 right-of-way. And Congress very well knew that. That was the  
8 problem they were trying to solve as evidenced by the  
9 legislative history that's attached to our reply brief, Your  
10 Honor.

11 **THE COURT:** But that amendment didn't really go to  
12 the immunity issues, that amendment went to another issue.

13 **MR. FEDDER:** No, immunity hadn't been raised at that  
14 point. And I won't guess why it hadn't been raised. At that  
15 point it was issues about being able to actually go to court  
16 and acquire the right-of-way. And if it was a simple matter  
17 -- well, I won't say. But when you look at the cases, the  
18 problem they were attacking was states interfering with the  
19 NGA certificated company's ability to go out and construct  
20 projects that the Federal Government authorized under the NGA.  
21 So in 1947, that's why they amended the Act, to give private  
22 pipeline corporations the power of eminent domain, to fix that  
23 problem. This is just a new form of that problem. It's  
24 70-plus years later, but this is the new form of that problem  
25 under the Sabine case. It's the same thing, just under a

1 different theory.

2 And the last thing, Your Honor, didn't hear a word  
3 about the actual instances we cited as we did in our opening  
4 brief about actual instances of delegation that were upheld in  
5 the face of state immunity challenges, which shows that, you  
6 know, this is something that is not only theoretical, but in a  
7 practical and legal sense has been done. This isn't a first  
8 instance. And the fact that the PennEast opinion is short,  
9 it's short we think out of necessity. It didn't need to be  
10 long.

11 **THE COURT:** All right, thank you. Here's what I'm  
12 going to do, Counsel: First, I want to compliment Counsel on  
13 the oral argument in the case. I think it was significant  
14 oral argument. What I'd like to do is just digest what I've  
15 heard. I note that we're here for the purposes of preliminary  
16 relief, so I understand that there's a time table that is very  
17 important. I dispatched my law clerk to give us some days  
18 next week in which I can either present an oral opinion  
19 related to the preliminary injunctive relief -- I wouldn't  
20 entertain any argument at that point in time, but lawyers  
21 always like to get an answer sooner rather than later, even if  
22 they disagree with the answer.

23 So what I'm going to do is I'm going to find a time  
24 that works with your individual schedules and looking at maybe  
25 Tuesday in the afternoon potentially at 2:30, or I'm looking

1 for sometime also on Wednesday as well. Again, I'm not going  
2 to entertain any additional argument. So for folks such as  
3 Mr. Fedder, if you went out of town, it's not a question of me  
4 entertaining or asking you any direct questions. I would just  
5 simply be reading into the record a decision regarding the  
6 preliminary injunctive relief with a subsequent follow-up  
7 either here or there with regard to the -- I guess arguably,  
8 you would need someone here to discuss bond issues, unless  
9 you're prepared to discuss that now. But at this point in  
10 time I'm looking -- it's no secret, I'm looking at the  
11 likelihood of success on the merits and the balancing of the  
12 equities and the irreparable harm aspect. I think I've  
13 telegraphed where my thought process is on this issue and I've  
14 got a rather tight body of case law or a limited case law upon  
15 which to rely.

16 Counsel, you can pull out your schedules. Any  
17 objection to proceeding in that manner, Mr. Fedder?

18 **MR. FEDDER:** No, Your Honor. One housekeeping  
19 matter, we had shared with Counsel a binder of four exhibits  
20 that were two demonstratives and two other exhibits. One was  
21 the FERC certificate and one was the Maryland Department of  
22 the Environment permit with the letter. Both sides have  
23 submitted to the Court in other forms. Would there be an  
24 objection if we move it for the Court to reference it for the  
25 record?

1           **MR. SNYDER:** No objection.

2           **THE COURT:** That's fine. Okay, very good. All  
3 right, so how is -- looks like I'm good for Tuesday at let's  
4 say 3:00, Wednesday at anywhere between 2:30 and 3:00 as well.

5           **MR. FEDDER:** I will represent to you, Your Honor,  
6 that I will move anything that I have that is a conflict  
7 Tuesday or Wednesday afternoon basically?

8           **THE COURT:** Yeah, correct.

9           **MR. FEDDER:** Yes, I will make --

10          **THE COURT:** Where were you traveling from, Mr.  
11 Fedder?

12          **MR. FEDDER:** Saint Louis and we have Southwest that  
13 gets us here and out.

14          **THE COURT:** Understood. I want to work with your  
15 schedule. Counsel?

16          **MR. SNYDER:** Either of those are fine.

17          **THE COURT:** So why don't we do Wednesday at 3 then.  
18 And I'll be prepared to issue my ruling at that particular  
19 time.

20                 All right, Counsel, is there anything else?

21          **MR. FEDDER:** Nothing from Columbia, Your Honor.

22          **MR. SNYDER:** No, Your Honor. Thank you.

23          **THE COURT:** All right, Counsel, it's a pleasure.  
24 All right, very good.

25                 **(Proceeding concluded at 11:12 a.m.)**

## 1 CERTIFICATE OF OFFICIAL REPORTER

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5 I, Nadine M. Gazic, Registered Merit Reporter and  
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